CRUDE METHODS OF LEGISLATION.

THERE are in active operation in the United States one National, thirty-eight State, and eight Territorial law factories, which, aside from the Municipal legislative bodies, are producing during several months in each year new laws, printed in annual or biennial volumes of many pages. In the more densely populated and richer States of the Union, the annual coming together of the law-making power is regarded with apprehension, and its adjournment is followed by a feeling of relief on the part of those members of the community who do not actively engage in politics and who pay the taxes. Year after year has this abnormal state of feeling been voiced by the press with such similarity of expression, that custom has staled speculation on the situation, which has come to be looked upon as one of the evils of our environment, such as possible frosts in early June, that may destroy the fruit crop, or a drought, that may diminish the product of cereals. This want of confidence in our law factories does not arise merely from apprehension of the evils of inaction, but from the fear of their too mischievous activity. It is not the amount paid to the legislators in the way of salary that in the least awakens the alarm of citizens. It is the product which they create—their "output"—which gives rise to the liveliest misgivings on the part of the persons who consciously bear the public burdens, and who are the very men called upon to maintain the toilers whose combined labor is by them viewed with so much of distrust; in short, the tax-payer is called upon to maintain and support law factories, the product of which, as a whole, he regards either as useless or dangerous.

A community tolerates the existence of powder mills, notwithstanding their dangerous character, because their product is necessary for national defense, for industrial purposes, for

mining operations, and for the sportsman. The benefits of the use of powder compensate, if such things may be compared, many thousand-fold for the evils endured. It would be folly, indeed, on the part of the community, were it to permit powder mills to be erected, if the danger and mischief of the results exceeded the advantages to be derived therefrom. It can scarcely be controverted that nine out of ten capitalists of the country would, if questioned, assert their belief that the legislatures annually do more harm than good at their sessions. As legislation is in its essence the highest, and should be the most beneficial, product of human effort, this state of facts is in itself evidence of a radically defective system of law production.

During the last days of its this year's session, two measures were before the Legislature of New York which curiously illustrate the remarkable condition of legislation in the United States. One was what was known as the "Aqueduct Bill," and the other was known as the "Pilotage Bill." The citizens of New York, at a public meeting and through the public press, said in most emphatic terms to the Legislature, that they preferred to wait another year for the initiatory steps to create a new aqueduct, rather than trust politicians with the building of it. Unless the measure placed the control of the expenditures in hands other than those of local politicians, in whom no confidence could be placed, New Yorkers were quite willing to suffer a little longer from an insufficient supply of water. Nevertheless, the Legislature passed the bill in an objectionable form, in order that "the boys" (the workers in politics) might get their fill of patronage and plunder.

The passage of the second bill, the Pilotage Bill, was urged by the Chamber of Commerce of New York, as a measure of relief from the excessive pilotage charges of the port of New York. This bill was advocated by all the interests which the Legislature was supposed to be called upon to serve, but it failed of passage. At a meeting of the Chamber of Commerce, after such failure was announced, Mr. Higgins, one of its members, said: "They sit there at Albany and simply laugh at us. They treat us with contempt and ignore our reasonable requests. Our liberties are fast being taken away from us by those politicians at Albany."

Is it not curious that the means which Americans have of reaching their legislative bodies after they are convened, and

compelling them to do their bidding, is not much in advance of the methods of influencing legislation adopted by the subjects of the so-called "effete monarchies" of Europe when they desire to protest against or to forward a measure that may be before the council chamber or legislative body advisory to the king? In monarchies of a constitutional character, subjects may hold meetings to indicate public opinion, and to give intimation of punishment should public opinion be disregarded. The emperor and the Reichstag, or the king and Parliament (if the measure be one for the benefit of the governing body and against the interest of the general public), will consider the question how far public opinion is aroused and what risk is run, if any, by braving it. If they conclude that the risk is not very great, they pursue the even tenor of their way and disregard the demand. If, on the other hand, they conclude that disregard of the intimation may involve a loss of power, they will probably comply. In either event, it is a demonstration of force, depending for its success upon the estimate made by the Government of the amount of reserve power behind the demonstration. From this it would appear that in the United States, as in Europe, the Government is one thing and the people another. Viewed from the stand-point of constitutional history, the people and the Government are one, but institutionally a very great antagonism exists between governed and governors. In this country, the gap is not so wide as in some others, but it nevertheless exists, otherwise harbor-masters' bills would be passed without the necessity of pressure on the part of the Chamber of Commerce, and aqueduct bills would be passed without danger of their being manipulated in the interest of politicians. That the wishes and the interests of the people are not regarded, but that, on the contrary, the politicians are banded together under different names, as a guild of craftsmen, against the nterests of the people, is indicated by the fact stated at the outset of this article, that in almost every State of the Union where large interests are at stake, the convening of the Legislature is regarded with alarm, and its date of adjournment marked as a red-letter day in the calendar of the year.

Now let us seek a little further for the cause of this antagonism and the means of its removal. One of the causes is doubtless to be found in the all but universal adoption of a vicious system of representation, by which American communities are

subdivided into geographical constituencies, each constituency being represented by a single member, elected by the majority of the electors in the district. This system is the source of the party machinery which is brought to a greater degree of completeness in the United States then elsewhere, and which brings with it all the evil elements of party tyranny. The substitution of a minority or personal system of representation for the geographical or district system would go far toward remodeling the personnel of legislatures, by substituting intellectual for geographical constituencies. The main difficulty, however, lies in the fact that improvements in legislative machinery have not kept pace in the United States with the financial and industrial development of the country. The great development of corporate wealth, and the almost infinite division of employments which the application of steam to industrial pursuits has created, bring upon the legislative bodies of every State having diversified industries and a considerable proportion of its wealth invested in corporate enterprises, a very strong pressure for special and local legislation to meet cases not provided for or not anticipated by the general law. In modern times, this pressure upon the legislative and administrative machinery of every community has been differently withstood in different countries. That under this pressure the antiquated machinery of legislation, adapted to the colonial days when industries were few, capital sparse, and the community homogeneous, constantly breaks down when used for modern legislative purposes, is not at all surprising. It would be wonderful if it did not break down. In modern engineering, when railway trains are to be carried across streams, railway bridges are built adequate to sustain them, and no attempt is made, from a reverential regard for the wisdom of the forefathers, to use bridges built by them for carrying a gig or a market-wagon. The remedy for many of the evils of mischievous legislation lies in improving legislation by the application of scientific methods so as to keep it abreast of the age. No legislative body can, in the present diversified and conflicting condition of individual interests, perform its duty, unless some other method than that which has prevailed in the United States is adopted, by which it may be informed as to the interests which call for legislation, and the effect such legislation will have upon those concerned. There is now practically no provision for giving notice to the community of

intended changes in the law and for gathering information, while the Legislature is in session, of their possible or probable effects.

General laws should be the offspring of the Government as represented by the party in power, and should be carefully prepared before the convening of the legislative body by thoroughly competent jurists, under the direction of statesmen specially charged with the responsibility of legislation. To accomplish this end, it will be necessary to create in each State an organization somewhat similar to a Cabinet, to prepare public bills in advance of the session. For the performance of that function, the existing political State organizations are wofully defective as to general legislation. Even the Cabinet of the United States is a Cabinet of administrative officers, who do not consider themselves charged with the duty of preparing legislative measures for the session, and whose attempt to do so would be regarded as an intrusion; and in the several States there is nothing in existence even remotely analogous to the English Ministry.

The political party in power, having no legislative organism as to general public law through which it can be held responsible for the legislation of the session, throws the blame of slipshod work on the Legislature, and as that body dissolves at the end of the year, there is no responsibility of practical value. The public legislation of the States of the Union is, therefore, wholly dependent for its substance and form upon the somewhat personal or private interests which suggest the framing of a public law, and upon the accidental ability of members of the Judiciary Committee, who, even when competent, are compelled to work under a pressure inconsistent with the attainment of scientific results.

As to private and local legislation, the condition is still worse. The people of this country have wholly failed to draw the logical distinction between private or local legislation and public legislation. The Roman distinction between general law and *privilegia*, or *constitutiones personales*, has been obliterated. The latter do not, properly speaking, come under the head of legislation at all, but are in the nature of an immunity granted by the sovereign power from the operation of general law, or of a special privilege which is not generally conferred by law. Private and local bills, therefore, are in substance, and in their

essential elements, judgments or decrees emanating directly from the sovereign power instead of intermediately from judges. They, however, partake of a judicial character. Says Sir Erskine May, in his book on "Parliamentary Procedure": "Parliament regards such laws as judicial proceedings, wherein persons whose private interests are to be protected appear as suitors for the bill, while those who apprehend injury therefrom are admitted as adverse parties in that suit."

The distinction, according to English ideas, between a public bill and a private bill is so fundamental that over the signature of the Queen to a public bill is used the expression "*la reyne le veult*"—it is the Queen's wish; to a private bill it is "*soit fait comme il est desiré*"—be it ordered as prayed for. It was only after the separation of the American colonies from England that the pressure of private interests for legislation and the evils of lobbying for the promotion of special interests arose. Our statesmen thought they were following English precedent in indiscriminately granting legislative powers, both in public and private affairs, to the legislative bodies of the several States. But it was forgotten that Parliament was the appellate court of last resort, and therefore used in private legislation judicial as well as legislative methods. It thus was able to surround its special legislation with certain safeguards, by enacting it under judicial forms, which gathered and sifted as far as possible all attainable information for the guidance of the legislator, and gave to adverse interests an opportunity to be heard by trained counsel in furtherance of and in opposition to a proposed private bill. Hence, even prior to the adoption of the Standing Orders, no great mischief was done in England by private legislation. In the United States, on the other hand, this power of special legislation was intrusted to the hands of inferior men, just at the time when the differentiation of employments, making private occupation more attractive than governmental employment, by the allurements of greater gain, caused the withdrawal from the public service of the most alert and intelligent members of the community. At the same time, a growth of corporate activities of great magnitude was developed from the very small germ which had existed in the eighteenth century. In the first half of the nineteenth century this growing power gradually took possession of, and to a certain degree controlled, the supply of commodities, the production of which had been greatly facilitated

by labor-saving machinery. The most useful and profitable of these occupations were of such great magnitude and risk that they could not be carried on at individual expense, and were possible only to the capital to be gathered together under corporate management, with limited liability. The progress of invention was at the same time fast making the business of constructing highways and transporting goods thereon a private corporate function instead of a governmental function, and the growth of wealth was very much in excess of the development of refinement, self-restraint, and public virtue. These causes developed the lobby, which made its appearance in England with an activity a little more disguised, and with manifestations of corruption a little less glaring and vulgar, than in the United States. Francis, in his "History of the Railway," says: "Members of the House of Commons were personally canvassed, solicitations were made to peers, influences of the most delicate nature were used, promises were given to vote for special lines before the arguments were heard, advantages in all forms and phases were proposed to suit the circumstances of some and the temper of others. Letters of allotment were tempting, human nature was frail, and the premium on five hundred shares irresistible."

The demand for private legislation, notwithstanding the fact that in England public bills have a sort of royal right of way to which private legislation must yield precedence, began to press seriously on public legislation and materially to interfere with the public duties of Parliament and the administration of the empire. Therefore, in 1847, a code was adopted known by the name of the Standing Orders, which, together with the acts establishing the Royal Gazettes and notices of publication therein, created a very complete system of practice in relation to private bills. The provisions thereby made for securing the rights of parties applying for, and of parties resisting special legislation, are as well adapted to secure their end of preventing injustice by legislation, as are the codes of practice and rules of pleading and procedure which prevail in courts of law to prevent unjust transfers of property through judgments and decrees.

Thenceforth, in England, a bill not of a public and general nature was placed, in practice as well as in theory, upon a footing entirely different from that of a public bill, and was treated as a claim by an applicant for legislation as against the whole community, which was to be tried as though it were a demand against the people at large for so much money.

All bills of a private or local character are divided into two classes. One of these embraces all bills which involve enlargements of powers of corporations or changes of acts incorporating public bodies or municipalities, which bills or amendments do not involve the exercise of the power of eminent domain. The other class embraces all bills which do involve the exercise of that sovereign power. These two classes embrace substantially the whole field of private and special legislation. Petitions for private bills, with copies of the proposed bills, must be deposited in the private bills office of the House of Commons about six weeks before the assembling of Parliament. In the case of bills of the second class, a plan of the work and a list of all owners along the whole line of the work whose interest may be affected or whose property is to be taken must accompany the petition, and notice of such petition and proposed bill must be published in the official gazettes and personal notice served on all persons whose land is to be taken *in invitum*, should the bill become a law. There are many other modes of procedure to be observed which, with few exceptions, need not be here noticed. If the bill is one which affects interests over which the Board of Trade exercises jurisdiction, such as canals, railways, or turnpikes, a copy of it must, in advance of the session, be lodged with the Board of Trade.

When the time has expired for depositing documents, opponents to the bills can, on examination determine whether the Standing Orders have been complied with. Should it appear that the Standing Orders have not been complied with, they may present and file in the same office counter-memorials of such non-compliance before the meeting of the officers, called examiners, whose business it is to determine whether the conditions preliminary to having the bill considered by the legislative body have been fulfilled. One of the examiners is appointed by the Speaker and the other by the House of Lords. They meet about a fortnight before the convening of Parliament. Notice is thereupon sent to the parliamentary agent who indorsed the petition, and to such as have in behalf of clients filed preliminary objections on the ground of non-compliance with Standing Orders, and on this preliminary issue a trial is had on these questions of practice only. When the petition and bills have passed this scrutiny,—to which unopposed bills, as well as those which are opposed, are subjected,—objections may be filed to the petition and clauses of the bills, which are thereupon introduced into the

House of Commons or House of Lords. If it has been decided that the Standing Orders have not been complied with, and the parliamentary agent claims that there is reasonable excuse for non-compliance, the case can be referred to the committee of nine members on Standing Orders, who may, by report, overrule the examiners and recommend indulgence; but the cases are rare when such non-compliance is excused and the bill considered.

The bills which have passed this scrutiny are thereupon referred to the respective committees of the House of Commons, who proceed to divide them into two classes, one class comprising unopposed, and the other opposed bills. Those that are unopposed are, if they belong to the more important class of private bills embracing the exercise of the right of eminent domain, referred to the chairman of committees of the House of Lords, and also to the Board of Trade, to suggest amendments and to act as scrutinizers and critics of the powers intended to be granted. Lord Redesdale, who has been for many years chairman of committees of the House of Lords, exercises almost despotic power over private bills. His suggestion and amendments, aided as he is by the Speaker's counsel, in addition to his own counsel, are incorporated in the bill almost, as of course, as his long experience and high character as legislator and jurist make his opinion on a private bill authoritative with the House of Commons Committee. Even when the bill is unopposed, it is, after its reference to committee, considered in the presence of the parliamentary counsel, who in the parliamentary part of the proceedings stands in the same relation to the agent that the barrister stands to the solicitor in the courts of law; and in certain cases, as already observed, every bill on subjects under the cognizance of the Board of Trade is opposed by it so as to cut down any unnecessary or dangerous clause granting additional powers.

Opposed bills, except railway and canal bills, go to the Committee of Selection, composed of the chairman of the Standing Orders Committee and four members nominated by the House at the commencement of every session. This committee classifies all private bills, nominates the chairman and members of these committees on such bills, and arranges the time of their sitting and the bills to be considered by them. Railway and canal bills go directly to the General Committee on Railways and

Canals. The first business of these committees is to form bills which come before them into groups and appoint sub-committees for their consideration, of which the chairman only is a member of the appointing committee.

These sub-committees are composed of a chairman and four members of the House and a referee, not a member, who is generally an expert on the subject-matters of the bills. Calendars are then prepared by the committees, and thenceforth, until the report, the bills and the opposition thereto are tried in the same manner and under like forms as a controversy before a court of law. All the formalities of a court of justice are maintained. If the promoters of a bill fail to sustain it during its progress, it is abandoned by the House in which it is pending, however sensible the members of the House may be of its value.

So completely is a private bill regarded by courts of equity in the light of an ordinary suit, that its promoters have been restrained by injunction from proceeding with a bill the object of which would, in effect, set aside a contract made by the promoters. Unopposed bills are referred to the chairman of the Ways and Means Committee of the House and the chairman of committees of the Lords, and at any time either of these chairmen can recommend that an unopposed bill shall be treated as an opposed bill, and thereupon it is to be proved before the appropriate committee as though a memorial had been presented against its clauses by an adverse interest. A complete fee bill provides for the expenses of all private and local bills through all the parliamentary stages. The charge borne by every bill before it becomes law for the payment of examiners, referees, counsel, and committee work, varies from five to fifteen hundred dollars. This charge is independent of the fees paid to parliamentary agents, counsel, and witnesses; and in addition to all these charges, the claimant for local or private legislation may be mulcted in a heavy bill of costs to adverse parties who prevail in defeating the bill, or so amending it as to secure rights which had been inadequately protected by the draft bill.

Private bills legislation is not only not a burden upon the public under this system, but is a source of revenue. All the expenses of a parliamentary session are in effect borne by the applicants for private and local legislation. By the adoption of this system, method and order have been introduced into the business of legislation. Parliament has thereby created a ma-

chinery by which, whenever special legislation is applied for, it is informed of all private as well as public interests to be affected by such legislation, and it thereby puts itself in a position intellectually to cope with the intelligence developed by the differentiation and division of employments. It has not only improved its law products, but has also cast out the evils which beset that species of law-making, and substituted a learned profession — the parliamentary bar — in the place of irresponsible and corrupt lobbyists. The people of the United States, on the other hand, by adhering to methods applicable to the primitive condition of a nation of planters and farmers, with simple wants, little credit, and a low industrial status, have drifted into a position as to their legislation not only out of all harmony but in sharp conflict with their industrial and commercial development.

England, by adopting this course of bringing method into its legislation, has accomplished three distinct and important results. In the first place, it has prevented the possibility of smuggling a private or local bill through the Houses of Parliament. Without adequate and complete notice to interests which might be adversely affected by it, such a bill cannot even be introduced. Secondly, it has imposed the work and the expense of special legislation upon the parties who seek it, and made every possible provision that no injury should be done by the granting of the special law. Thirdly, it has ridden itself of the lobby. When the grant by special legislation went no longer by favor but by merit, and when the vote of the legislator could no longer be won by underhand means, the class of men who theretofore had been serviceable in the lobby of the House of Commons could no longer be made useful; and a trial requiring trained intellects being the condition precedent to a grant of power, the parliamentary lawyer took the place of the lobbyist. In short, there is as great a distinction between the men who now promote private and special legislation in England and the men who promoted it before the existence of the Standing Orders, as there is between a lawyer who argues a cause before a common law tribunal of dignity and the go-between of a Turkish court to fix the judge in a suitor's behalf by a propitiatory gift.

The American people are not slow in their perceptions, and have, therefore, not been oblivious of the evils incident to the present system of legislation; but they are a busy people, and are, therefore, too impatient carefully to study out the remedy.

Palliatives in statecraft are the things most likely to attract them, because the reasoning that leads to their acceptance lies upon the surface. It is therefore not surprising that the constitutional amendments which have been adopted in many States, and which are, more or less, in process of adoption in many others, to reach this evil, should be of the nature of palliatives. Palliatives, however, simply act upon the symptoms of a disease, leaving the source of it in full activity; resort to them is, therefore, likely in the end to prove more injurious than if they had never been applied. So will it, in all probability, be with the attempted remedial measures that have captured the public ear and are advertised as infallibly curative of the disease of bad legislation.

One measure of this class is the constitutional limitation upon the power of the legislatures to pass special and local laws in a large number of enumerated cases, and requiring that the legislation upon such subjects shall be by general law. As these cases embrace the main field of special and local laws, such constitutional provisions have for their inevitable effect, that the pressure for special immunity from the operation of the general law or for special privileges will hereafter more extensively cause, and, to a considerable degree, has already caused, great and harmful changes in the general body of the law. Thenceforth personal and not general interests operate to change and modify the *corpus juris* of the State. Special and local legislation is thereby not diminished, but re-appears in its most dangerous form, *i. e.*, special legislation disguised as general laws. So that now, within less than ten years after the adoption of this constitutional amendment in the State of New York in 1874, no lawyer feels safe, without a critical examination of the annual statutes, to give an opinion as to the general body of the law, which had previously been regarded as well settled, as he cannot tell how the Legislature may have been induced to change the well-established law for the purpose of meeting a special case. More particularly is this tendency a dangerous one in a community like that of the State of New York, where there is no direct responsibility for the public law-making of a session except with a Legislature which has ceased to exist when the law is published in accessible form. No ministry is responsible for the laws of the year, and, excepting the veto, the only safeguard that exists against mischievous legislation of

this character slipping through from year to year, is in the alertness of the judicial committees of the two branches of the Legislature, who are overtaxed with work and not overburdened with knowledge.

The second remedy of the palliative order is to have the Legislature meet less often. Biennial sessions have therefore been proposed, and in some States adopted. The argument which supports the reduction of the activity of the Legislature by one-half is a captivating one to a community which regards with dread any meeting of its legislative body; yet a little reflection will show how utterly ineffective this proposed remedy will be. The legislative body can commit as great a sum-total of mischief, when convened but once in two years, as it now does when convened every year. And the mischief is sure to be greater, for the reason that when the Legislature meets but once in two years, the number of bills which will be crowded upon it is sure to be larger than when it meets annually. Already, under the present unorganized habit of legislation, the individual members of the Legislature cannot acquaint themselves properly with the merits of any proposed law, for want of time and of judicial machinery. With the inevitable result of being more occupied when it does meet, the evils that must result from ignorance alone will therefore be considerably increased when the Legislature meets less often.

An illustration used by the writer on a former occasion may do service once more. Would not a man have run serious risk of being regarded as an imbecile had he proposed, in 1871, as a remedy for Judges Barnard and McCunn's mischievous activity on the bench, that they should sit but half the year instead of during the whole year? So long as there was no limitation put upon the amount of the mischief that they were enabled to do within the given time, it is clearly obvious that by limiting the time the mischief is not diminished. So, while this remedy is useless for good, it is fraught with the special disadvantage that evils which the Legislature alone can restrain must go unredressed for several years to await the coming together of the law-makers.

It must be admitted that a reform, like the one proposed, of methodizing our legislation, is not easy of accomplishment. The mere adoption of Standing Orders or rules would bind no legislative body any longer than its will would see fit to be

bound by them, and they would clearly not be binding upon a subsequent Legislature. It would, therefore, be necessary to embody the principles of such a reform in the State constitutions, and require the Legislature to enact rules for methodizing its work and carrying on its business according to some formula contained in the fundamental law of the people. The necessity for such a reform need scarcely be further urged. The writer of these pages, during a session of the British Parliament, followed a private bill from its inception to its adoption, and his experience has enabled him to compare that method of legislation with the legislative practice in several of the States of this Union. He considers it absolutely no exaggeration to say, that the difference in favor of the English method as against the American is in every respect as great as the difference between the procedure and practice, and the results in the way of justice arrived at, say by the Supreme Court of the United States, and the procedure, practice, and the judicial results arrived at by a tribunal in a semi-civilized community such as Siam or Arabia.

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